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Nos. 82-1860 and 82-1862

IN THE

Supreme Court of the United States

October Term, 1982

PROSSER'S MOVING AND STORAGE COMPANY, a Missouri Corporation,

Petitioner,

and

SCHNEIDER MOVING AND STORAGE COMPANY,

Petitioner,

vs.

LORAN W. ROBBINS, *et al.*, TRUSTEES OF THE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION AND HEALTH AND WELFARE FUNDS,

Respondents.

BRIEF OF AMICI CURIAE MERCHANTS AND MANUFACTURERS ASSOCIATION AND ROZAY'S TRANSFER IN SUPPORT OF PETITIONERS.

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Respondents.

BRIEF OF AMICI CURIAE MERCHANTS AND MANUFACTURERS ASSOCIATION AND ROZAY'S TRANSFER IN SUPPORT OF PETITIONERS.

Statement of Interest of Amici Curiae.

The Merchants and Manufacturers Association (the "Association") is a non-profit California corporation whose purpose is to augment the human resources management of member firms. Over 2,600 companies of varying sizes and in diverse industries are members of the Association. These members collectively employ over one million employees in the State of California.

Many of the Association's members are parties to collective bargaining agreements which provide that the members will contribute to a multiemployer pension trust fund on behalf of specified employees. These collective bargaining agreements typically provide that any disputes over the interpretation of a term of the agreements will be submitted to final and binding arbitration.

The Association's members who are parties to such agreements strongly oppose any erosion of the important federal policy requiring that a binding arbitration provision in a collective bargaining agreement must be utilized. These members believe that only a labor arbitrator is capable of correctly resolving a dispute over the meaning of the pension provision of a collective bargaining agreement.

Rozay's Transfer is a California employer engaged in the trucking industry. It is presently a defendant in two separate lawsuits with the Southwest Administrators of the Western Conference of Teamsters Pension Trust Fund. Each case concerns a claim for allegedly delinquent contributions to the Pension Trust.

Pension contributions are paid to the Pension Trust in accordance with the collective bargaining agreement between Rozay's Transfer and Local Freight Drivers Union, Local 208, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. The agreement provides that any disputes arising under it will be determined according to the agreement's grievance and arbitration provisions. Nevertheless, in each instance, the Trust filed its lawsuit without exhausting the grievance procedure. In the first dispute, the Trust demanded pension contributions on behalf of "casual employees." In the second dispute, the Trust demanded contributions for several months during which Rozay's Transfer had no duty to contribute. Each lawsuit depends upon the interpretation of the terms

of the collective bargaining agreement.

Rozay's Transfer maintains that these issues should be submitted to arbitration for two reasons: first, an arbitrator is in a better position than a court to interpret the agreement in accordance with the "law of the shop" in the trucking industry; and second, Rozay's Transfer bargained for the resolution of collective bargaining disputes by arbitration, and it is entitled to the benefit of its bargain.

Rozay's Transfer and the Association have an interest in the cases now pending before the Court because in these cases the Court will decide whether, in a dispute over the meaning of a pension provision set forth in a collective bargaining agreement, pension fund trustees must utilize the grievance and arbitration procedures set forth in the agreement. The Court's holding will have a direct impact on the two lawsuits now pending in which Rozay's Transfer is a defendant, and on future disputes between members of the Association and their unions.

Consent of Parties.

The Petitioners in Nos. 82-1860 and 82-1862, and the Respondent in both cases, have consented in writing to the filing of this brief by amici curiae. The parties' written consent will be filed with the Clerk of the Court concurrently herewith.

Summary of Argument.

When a collective bargaining agreement contains an arbitration clause, federal labor policy requires disputes over the meaning of a term in the agreement to be submitted to arbitration. The labor arbitrator is familiar with what this Court has called the "industrial common law," and is therefore in a better position to interpret the agreement than is a court.

There is no reason why this important federal policy should not be applied to the pension article of a collective bargaining agreement in the same way that it is applied to every other provision of the agreement. Disputes over the pension article will commonly be of two types: disputes over *who* is covered by the provision, and disputes over *how much* of a contribution must be paid. Both types of disputes require interpretation of terms of art such as "regular employee" or "straight-time pay." Arbitrators are in the best position to interpret such terms in light of the industrial common law.

This Court's decisions in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) and *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981) provide no support for the decision below. In those cases the Court held that because an arbitrator had no expertise in interpreting federal statutes, arbitration decisions were not binding on the question of whether an employer violated federal equal employment law or minimum wage law. In the instant cases, by contrast, if the disputes were submitted to arbitration the arbitrator would not be asked to interpret a federal statute, but would be asked what the collective bargaining agreement means.

The court below explained that its decision was necessitated by what it called "federal pension policy." The court offered no explanation why initially submitting disputes to arbitration would in any way be contrary to federal pension policy. The court below expressed fears that a union might wrongfully refuse to process a grievance over pension contributions. This fear is unfounded: if the union fails to act, the trustees can then sue for the contributions in federal court. Moreover, this Court's recent decision in *Bowen v. United States Postal Service*, ___ U.S. ___, 103 S. Ct. 588 (1983), subjects the *union* to damages if it breaches its duty

of fair representation, and insures that the union will not arbitrarily fail to process legitimate claims.

Finally, the union must be permitted to review a claim to see if it has merit *before* litigation is commenced. The union is in the best position to evaluate the merits of a potential claim, because the *union*, not the trustees, negotiated the agreement and knows what benefits it won from the employer, and what benefits it did not. The union must have an opportunity to refuse to process claims which it knows to be meritless before the trustees take meritless claims to court.

ARGUMENT.

I.

Pension Contribution Cases Involve Disputes Over the Interpretation of the Terms of a Collective Bargaining Agreement.

Contributions to a pension trust fund are fringe benefits often sought by unions in collective bargaining. From the union's point of view, obtaining an employer's agreement to contribute to a multiemployer pension trust is a major bargaining goal. These trust contributions, governed by § 302(c)(5) of the Labor Management Relations Act, 29 U.S.C. § 186(c)(5), are especially valuable to employees in industries such as the trucking industry because employees frequently change employers.

For many employers, especially small employers, pension contributions to a multiemployer § 302(c)(5) trust were at one time less expensive than establishing their own pension programs. The advent of multiemployer pension plan withdrawal liability has significantly reduced this incentive. From the employer's point of view, participation in the multiemployer pension trust is only feasible if the employer can determine in advance what the cost will be. In negotiating with its union, therefore, the employer will attempt to specify clearly which employees will be covered and how much of a contribution will be made for them. During negotiations, the pension plan administrators play no role at all; the agreement is reached solely between the employer and the union.

While the parties will try to be as clear as they can in the pension article of the agreement, disputes will inevitably arise over its meaning. These disputes will generally be of two types: (1) *who* is covered by the pension article; and (2) *how much* of a contribution is required. The resolution

of each type of dispute will turn on an interpretation of the agreement itself, in light of the negotiating history and the practice in the industry.

The instant cases now before the Court are good examples of the first type of dispute. The collective bargaining agreements provide for contributions to be made on behalf of "regular employees." The employer and the pension trustees in each case have a dispute over who is included in that term.

Amicus curiae Rozay's Transfer is presently involved in a similar dispute with a pension trust.* The question in that case is whether pension contributions are required to be made on behalf of "casual employees," as that term is used in the collective bargaining agreement. In order to resolve the dispute, the decision-maker must determine what the parties meant when they used the term "casual employees" in their agreement.

A second type of dispute which may arise concerns the *amount* of pension contributions to be made on which types of compensation. For example, the pension provision of a collective bargaining agreement may provide that the contribution will be a specified percentage of the employee's "wages" or of the employee's "straight-time" pay. Disputes can easily arise as to the meaning of these terms. Does the term "wages" include bonuses, shift differentials, call-in pay or standby pay? Does the term "straight-time pay" include double pay for Sundays, if Sundays are a regularly scheduled workday, or meal payments, or overtime penalty provisions such as "golden time"? As in the case of determining who is covered, these disputes will depend on the

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*Rozay's Transfer asks this Court to take judicial notice of this action. Copies of the complaint and answer are on file in the Los Angeles County Superior Court, Case No. C 291662.

meaning of the terms used in the collective bargaining agreement.

An excellent illustration of this second type of dispute is the decision of Arbitrator Drotning in *American Ship Building Co. and International Brotherhood of Boilermakers, etc., Local 358*, 75 L.A. 1252 (Drotning 1980). For the Court's convenience, a copy of this decision is attached hereto as Appendix A. In *American Ship Building*, the collective bargaining agreement contained a provision requiring that pension contributions be made: "on the basis of twenty-five cents ($.25) per hour for all actual hours worked and/or paid for all employees covered by this Agreement." A dispute arose over whether overtime hours at double pay should trigger pension contributions of $.25 per hour (based on actual hours worked) or $.50 per hour (based on hours paid).

A second dispute arose over whether pension contributions must be made for employees on funeral leave. The employer conceded that contributions must be made for paid holidays and vacations, but maintained that no contributions were due for employees on paid funeral leave. The employer argued that because funeral leave was unexpected paid time off, and therefore did not appear in the employer's calculations of the cost of the pension program, no contributions were due for such time.

In order to resolve the two disputes, the arbitrator took testimony regarding bargaining history, and applied the "law of the shop" to the contract. In determining the overtime hours dispute, the arbitrator ruled for the employer because "the phrase, 'actual hours worked and/or paid' is superfluous and confusing if it really means hours paid." 75 L.A. at 1254. In resolving the funeral pay dispute, the arbitrator applied his knowledge of the collective bargaining process. He held that funeral leave was no different from holiday or

vacation paid time off, explaining: "it makes no practical sense to think that the Union would demand the inclusion of holiday and vacation pay and leave out funeral pay." The arbitrator therefore held that pension contributions must be made for each hour of paid funeral leave. This case is a classic example of how a labor arbitrator interprets an ambiguous provision of a collective bargaining agreement by applying his own common sense and the "law of the shop."

II.

Judges and Juries Are Not Competent to Decide Disputes Over the Meaning of the Pension Article of a Collective Bargaining Agreement.

This Court decided over 20 years ago that disputes over the meaning of a collective bargaining agreement are to be resolved by labor arbitrators, not by the courts. The Court explained that the interpretation of a collective bargaining agreement demands knowledge of "the industrial common law — the practices of the industry and the shop . . ." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960). Such knowledge is beyond the ken of most judges and all juries.

As the Court explained in *Steelworkers, supra*, arbitration is preferred over judicial litigation to resolve such disputes. In the Court's words:

> "The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts." 363 U.S. at 581.

The Court went on to note that the labor arbitrator is selected by the parties because of their confidence "in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment." 363 U.S. at 582.

These principles certainly apply to disputes over the meaning of a pension article in a collective bargaining agreement. Labor arbitrators are in a far better position than judges or juries to interpret such terms of art as "regular employees," "casual employees" or "straight-time pay." As evidenced by Arbitrator Drotning's decision in *American Ship Building, supra,* 75 L.A. 1252, labor arbitrators with experience in a given industry, who are well-versed in the industrial common law of that industry, can interpret ambiguous contractual terms in light of the "law of the shop." They will also be able to evaluate testimony over bargaining history to determine what the parties intended by a specified term. It is for these reasons that Congress declared that arbitration is "the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement . . ." 29 U.S.C. §173(d).

If the decision below stands, this policy will be severely undercut. Judges or juries will interpret such terms of art as "casual employees" or "straight-time pay" instead of arbitrators. The court below offered no reason why courts would be in a better position than arbitrators to interpret such terms. In fact, no such reason exists. These terms are no different from any other terms in a collective bargaining agreement, which are to be interpreted by arbitrators, not courts.

III.

The Court Below Erred by Relying on This Court's Decisions in *Barrentine v. Arkansas-Best Freight System* and *Alexander v. Gardner-Denver.*

The court below attempted to justify its departure from 20 years of established labor law by relying on a principle established by this Court in two cases, *Alexander v.*

Gardner-Denver, 415 U.S. 36 (1974), and *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981). In *Alexander v. Gardner-Denver*, the Court held that because a labor arbitrator had no expertise in interpreting Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, his decision that an employer had not violated the nondiscrimination clause of a collective bargaining agreement would not mean that the employer had not violated Title VII. Similarly, in *Barrentine*, the Court held that an arbitrator's decision that the company did not violate the collective bargaining agreement by refusing to compensate its drivers for time spent inspecting their trucks would not preclude a private action for unpaid wages under the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*

In the instant cases, by contrast, if the disputes were submitted to arbitration, the arbitrator would not be called upon to interpret the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, or any other federal or state law. The arbitrator would be asked to interpret the collective bargaining agreement. Specifically, the arbitrator would be asked what the parties meant when they used the term "regular employees" in their agreement. In determining such questions it is the courts and not the arbitrators who lack expertise. The interpretation of contractual terms such as "casual employee" or "straight-time pay" are better left to arbitrators.

IV.

The Employer Who Bargained for an Arbitrator's Determination of Disputes Is Entitled to the Benefit of Its Bargain.

The decision of the court below deprived the employers of the benefit of their bargains. The employers bargained for a provision in the contract under which disputes over

its meaning would be resolved by arbitration. The decision below deprives the employers of the benefit of this bargain by requiring disputes over the meaning of the pension article to be litigated in a court.

An employer may have several reasons for seeking an arbitration provision. First, arbitration is a quick method of resolving disputes. An arbitration will commonly be scheduled within months of a dispute arising. A court action, by contrast, may take years. For example, amicus curiae Rozay's Transfer is a defendant in a court action over pension contributions which was filed in July 1979. The case is still pending.* The employer would have a particular reason for seeking a quick resolution of a dispute over pension contributions, because such a dispute would involve present and future contributions, as well as past contributions. For example, suppose an employer and the trustees had a dispute over whether contributions must be made on behalf of casual employees. In many courts, the dispute could sit for years waiting for a trial date. While the parties wait for a trial date, the employer would continue to withhold contributions for the disputed classification. After several years of waiting, the employer could be faced with a huge judgment, including very high penalty and interest provisions.

Second, as noted earlier, the employer has selected arbitration as the means for resolving disputes because of its confidence in the arbitrator's knowledge. In this Court's words:

> "The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed

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*In Los Angeles County Superior Court a 4-5 year wait from the filing of the complaint until trial is the norm.

in the contract as criteria for judgment." *United Steelworkers of America, supra*, 363 U.S. at 582.

The decision below deprives an employer of this benefit. Instead of the knowledgable arbitrator for which it bargained, the employer is forced to litigate before a judge or jury wholly unfamiliar with the industrial common law. Additionally, the employer and union run the risk that crucial evidence might be excluded because of technical rules of evidence not applied in arbitration.

Third, an employer may have sought arbitration because it is a far cheaper method of resolving disputes. It generally does not include expensive discovery, such as interrogatories or depositions. The actual arbitration will probably be shorter, and therefore less expensive, than a court trial. There is only limited judicial review of an arbitration award, and therefore little chance of additional expenses on appeal.

Finally, the employer seeks arbitration to avoid the risk of conflicting interpretations. The court might define the term "regular employee" one way for pension purposes while an arbitrator might construe the same term differently for purposes of the seniority or overtime articles. Such conflicting interpretations would create havoc in the day-to-day application of the collective bargaining agreement.

For one or more of these reasons, most employers bargain for an arbitral determination of contract disputes. The decision below deprives employers of the benefit of that bargain. The court offers no justification for doing so; as noted above, it offers no reason why courts are any more qualified to interpret the meaning of the pension article of a collective bargaining agreement than they are to interpret any other article. In the absence of any such reason, the federal policy should be maintained, and the employers should be granted the benefit of their bargains.

V.

Federal Pension Policy Is Not Inconsistent With the Requirement That Disputes Over the Meaning of a Collective Bargaining Agreement Be Submitted to Arbitration.

The court below acknowledged the important federal policy of requiring disputes over the meaning of a collective bargaining agreement to be submitted to arbitration. Nevertheless, the court held that this policy was subordinate to what it viewed as the national pension policy. The court cited several decisions by this Court which it said established such a national pension policy. Interestingly, the court below stated that these cases did not compel its holding, only that they are "suggestive enough to raise serious questions" about earlier Eighth Circuit decisions which required arbitration.

The rationale offered by the court below is wholly unpersuasive. Nothing in federal pension policy requires that a court and not a labor arbitrator should construe the meaning of a term in a collective bargaining agreement. The court cites this Court's decision in *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982), and its description of the legislative history of the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§ 1132 *et seq*. According to the legislative history, by these Amendments Congress intended to eliminate "costly and complex litigation concerning claims and defenses *unrelated* to the employer's promise and the plans' entitlement to the contributions." 455 U.S. at 87 (Emphasis in original.) This legislative purpose supposedly calls for dispute-resolution in a court instead of before an arbitrator.

The court's reasoning is confusing to say the least. Arbitration is the antithesis of "costly and complex litigation."

Yet the court seems to be saying that because Congress sought to eliminate complex and costly litigation, disputes must be resolved in court instead of before an arbitrator! Surely, the opposite should be true: Congress' intention to abolish costly and complex litigation would indicate that arbitration is the favored remedy.

Moreover, the Court stated that Congress sought to eliminate litigation "over claims and defenses *unrelated* to the employer's promise . . ." In the instant cases, the disputes are directly related to the employer's promise: specifically, the question in each case is what was meant by the employer's promise to make pension contributions. There is no indication that Congress intended to preclude an employer from litigating such a dispute before an arbitrator.

VI.

It Is Unlikely That a Union Will Refuse to Process Legitimate Claims in Light of This Court's Decisions in *Vaca v. Sipes* and *Bowen v. United States Postal Service*.

The court below was very concerned that if trustees were required to ask the union to arbitrate, the union might refuse, for improper reasons such as favoritism. The court below apparently believed that if the trustees asked the union to arbitrate and the union refused, the contributions would be lost forever. This is simply untrue. Clearly, if the union were to do so, it would breach its duty of fair representation, and the trustees could then initiate a lawsuit against the union for its breach of the duty of fair representation.

The court below made no mention of the fact that a party aggrieved by a union's breach of the duty of fair representation has a remedy: a lawsuit brought under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185. In *Vaca v. Sipes*, 386 U.S. 171 (1967) the Court held that an

employee wrongfully discharged could sue the employer and his union if the union breached its duty to him by failing to pursue his grievance. The Court explained:

> "To leave the employee remediless in such circumstances would, in our opinion, be a great injustice." 386 U.S. at 186.

By the same token, the trustees would not be remediless if the union wrongfully refused to process a claim for unpaid pension contributions. Like the employee in *Vaca*, they could sue in federal court.

More recently, this Court has held that when a union breaches its duty to the employee by failing to pursue a grievance, the union can be responsible for a proportionate share of the employee's damages. *Bowen v. United States Postal Service*, ___ U.S. ___, 103 S.Ct. 588, 74 L. Ed. 2d 402 (1983). The *Bowen* case provides an additional guarantee that a union will not arbitrarily refuse to process a legitimate claim for unpaid pension contributions: under *Bowen*, the union could be required to pay a share of those contributions if its refusal to pursue the grievance constituted a breach of the duty of fair representation. For this reason, the court below's fear that unions will capriciously refuse to process legitimate claims is unwarranted.

VII.

The Union Should Be Given an Opportunity to Decline to Process Meritless Claims.

The decision below ignores the fact that a union might have a very legitimate reason for declining to take a case to arbitration: the union might know that the claim is meritless. For example, suppose the union and the employer agree during negotiations that no pension contributions will be made for part-time employees. The written collective bargaining agreement is ambiguous on this point, but the

parties' statements during the negotiations clearly reflect this understanding. Suppose further that the pension trust, after conducting an audit and discovering that no pension contributions have been made for part-time employees, wishes to collect what in its view are delinquent contributions. If the trustees are required to pursue arbitration through the union, the union will presumably inform them that no contributions are due for part-time employees, and that it will not pursue the grievance. The matter will, quite properly, end there. It is the *union*, after all, and not the trustees, who bargained with the employer. They know which benefits they won for the employees, and which benefits they did not.

If, however, the decision below stands, then the trustees in the hypothetical case would have no reason to pursue the matter with the union. They would go straight to court and file an action seeking contributions for part-time employees, in spite of the fact that there is no contractual right to such contributions. The employer, of course, would defend the action by arguing that the union agreed that no contributions would be made for part-time employees, but it is unlikely that the employer would win a motion to dismiss or a motion for summary judgment on this issue. Instead, the employer and the trustees would engage in the kind of "costly and complex litigation" which Congress sought to avoid when it amended ERISA in 1980. *Mullins, supra*, 455 U.S. at 87.

Conclusion.

For all the foregoing reasons, it is respectfully submitted that the decision below should be reversed, and this Court should hold that a claim for unpaid pension contributions

which requires interpretation of a collective bargaining agreement must be determined according to the grievance and arbitration provisions of the agreement.

DATED: November 17, 1983.

Respectfully submitted,

STEPHEN P. PEPE,

Counsel of Record for Amici Curiae Merchants and Manufacturers Association and Rozay's Transfer.

Of Counsel:

O'MELVENY & MYERS,

JOEL M. GROSSMAN.

APPENDIX A.

AMERICAN SHIP BUILDING CO. — Decision of Arbitrator

In re AMERICAN SHIP BUILDING COMPANY, AMSHIP DIVISION, LORAIN YARD and INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, LOCAL 358, FMCS Case No. 80K/20357, December 3, 1980

Arbitrator: John E. Drotning, selected by parties through procedures of Federal Mediation & Conciliation Service

DROTNING, Arbitrator. — The parties jointly submitted the following issue:

> Is the Company violating articles 9 and 34 of the Agreement by not making pension contributions on actual hours worked and/or paid?

Testimony of the Parties

(a) *Union*: Mr. Thomas Cooper testified he had been involved in the negotiations leading up to the present Agreement and that he and Mr. Sepelak chaired these sessions. He went on to say that the Union submitted a proposal on pension contributions. This was subsequently revised, said Cooper, and this revision contains the best possible language and it means that contributions on actual hours worked and/or paid. Mr. Cooper asserted that if an employee worked 8 hours at double time, the pension contribution of $.25/hour should be multiplied by 16 hours. This intent, continued Cooper, was clearly stated in the negotiations and well understood by both sides.

Mr. Cooper testified that the Company countered the Union's proposal by submitting language which stated hourly pension contributions were for "all straight time hours".

The Company's proposal, continued Cooper, was not incorporated into the Agreement and the idea of straight time hours was never discussed at the table. Mr. Cooper went on to say that the Union Exhibit #5 is identical to article 34 of the Agreement except the phrase "as soon as possible" refers to the Toledo Yard. Union Exhibit #7, said Cooper, was submitted on 1/27/79 and was ratified by the Chicago and Toledo Yards and rejected by the Lorain Yard. Mr. Cooper made brief comments on Union Exhibits #8-#12 and said Union Exhibit #13 is identical to the Agreement and is, in addition, similar to Union Exhibit #1.

The Union also cross examined Mr. Stan Lepkowski, who acknowledged he was not involved in all negotiations and said he was not sure if he was present when the Union submitted its pension proposals, but he was aware of all economic demands. Mr. Lepkowski said the Company had put a limit on total pension costs and he agreed that the Company proposals covered all of article 34. He asserted that the Company maintained that pension contributions should be based on hours worked and that "and/or paid" phrase was to accommodate holidays and vacations. Lepkowski testified that actual hours worked was discussed at the table and these discussions were included in the Company's total pension cost calculations.

Mr. Lepkowski said the Company made pension contributions for hours not worked by employees on holidays or vacations but not for funeral leave since we could not predict these hours.

In closing, the Union argues that the Company is attempting to achieve in arbitration what it could not obtain in negotiations. Article 34 contains clear language and that "and/or" is equivalent to "either/or" and therefore the Union claims the Company is violating the Agreement by not making pension contributions for hours paid.

The Union asks that its grievance be sustained and that this award be retroactive to the date the employees returned to work. It also asks that the Arbitrator retain jurisdiction until the Award is implemented.

B) *Company:* The Company's witness, Mr. Stan Lepkowski, testified he participated in most all of the negotiations leading up to the present Agreement. He stated that he generated the cost data on Article 34 and he said that since 1961 the Pension Fund had been actuarial funded plan administered by the Company. The Union, continued Lepkowski, wanted to transfer the fund to the Boilermaker's Trust Plan and have the International administer it in Kansas City.

Lepkowski said he arrived at the hourly contribution of $.2486/hour by dividing the annual cost of the old plan per employee by 1705 hours. He went on to say that the Company tried to make the contributions on hours worked only but that the Union had problems with vacations and holidays. The final figure of $.25/hour worked and/or paid, said Lepkowski, was jointly determined so as to not to increase annual pension costs. The words "and/or" contained in Article 34, said Lepkowski, were designed to cover holidays and vacations, but not funerals since funeral leave is not predictable.

The Company also cross examined the Union witness. Mr. Cooper testified that he was not at every negotiations session and therefore had no specific knowledge of the submission dates of Union Exhibits #1-12. He went on to say that pension contributions should be paid on hours paid. Thus, the pension calculation for a 12 hour day comprising 8 hours at straight time plus 4 hours at time and one-half should be 14 hours x $.25/hour. Mr. Cooper did not answer the Company's next question which was: "What then, is the meaning of hours worked?" He did say that he was not

sure that the words, "hours worked" in article 34 were necessary.

Mr. Cooper agreed that the language of article 34 speaks for itself and that the phrase "actual hours worked and/or paid" is simply standard union contract language. However, Mr. Cooper agreed that the last portion of the above phrase, "and/or paid", is intended to accommodate pension contributions for vacation and holiday hours. Mr. Cooper also acknowledged that if there were no "/or paid" in the phrase, there would be no pension contribution for holiday or vacation hours.

Mr. Cooper said the Union did not exactly agree with the Company's premise that the pension costs should remain constant.

In closing, the Company argues that the Union did not prove its allegation that the Company violated article 34. Moreover, the Union never raised the issue of funeral leave.

The Company argues that the logical extension of the Union's position is that the Company pay $.25/hour for all hours paid and therefore, there would be no need for the words "actual hours worked". The Company states it agreed with the Union's pension plan changes while the Union agreed to keep costs constant.

The Company acknowledged that its position on contributions for funeral leave are less clear, but it does insist that the Company's intent, which was well known by the Union, was to maintain pension costs. Therefore, asserts the Company, its intent must be accepted even though the language does not specifically exclude funeral pay.

Discussion and Award

The major issue is whether pension contributions must be made on the basis of hours paid or hours worked? A minor issue is whether funeral leave is treated as are holidays

and vacations? Let me deal with the major issue first.

Article 34 states, in part, that the Company will make pension contributions:

> . . . on the basis of twenty-five cents (.25¢) per hour for all actual hours worked and/or paid for all employees covered by this Agreement.

What is clearly intended by both parties is that contributions are made for: 1) hours worked, and 2) vacation and holiday hours paid. What is not clear is the contribution for overtime hours.

The Union asserts that such contribution is based on hours paid and the Company asserts it is based on hours worked. The Union's testimony, however, is not persuasive for at least two reasons. First is that overtime pay is calculated in the following way: Number of overtime hours x overtime rate (either 1½ or 2). To be sure 4 hours overtime at 1½ is equivalent to 6 hours at straight time, but the employee actually worked four hours, not six. Second, the phrase "actual hours worked and/or paid" is superfluous and confusing if it really means hours paid. The phrase should read "actual hours paid" for the Union's intent to hold. Therefore, article 34, taken together with the testimony, supports only one conclusion which is that the pension contribution for overtime hours is based on the actual overtime hours worked, not the amount of wage earned and, subsequently, converted into a straight time hour equivalent.

The minor issue is, on the one hand, less complex but, at the same time, much more difficult to answer since there was little testimony on this. The Union contends that the Company should make pension contributions on funeral pay in exactly the same manner it now makes pension contributions on vacation and holiday pay. The Company says deaths are unpredictable and this coupled with the Com-

pany's intent to maintain pension costs forces a conclusion that funeral pay is not covered by the phrase "and/or paid".

The arguments on both sides are weak. The Union's position is a contention. It offered no persuasive evidence that funeral pay was to be treated like vacation and holiday pay with respect to pension contribution. By the same token, the Company's argument that it cannot predict deaths is not particularly persuasive for two reasons. First, past experience on funeral leave would certainly allow some predictability and while it might not be precise, the Company could identify a range of possible hours. Second, the question of inability to predict deaths might be just as valid for overtime hours worked. The latter may be a bit easier to predict than deaths, but it still is somewhat uncertain and as a result, pension costs cannot be predicted to the last dollar simply because the Company cannot predict exact overtime. Therefore, it is necessary to look at additional evidence, however meagre.

The exclusion of funeral pay from the phrase "and/or paid" is an anomaly. That is, it makes no practical sense to think that the Union would demand the inclusion of holiday and vacation pay and leave out funeral pay. The Union alleges that funeral pay should be treated like holiday and vacation pay and the Company asserts that such a decision would increase pension costs. Neither the Union's or the Company's contentions constitute hard evidence but the Union's position is compatible with existing practice with respect to holiday and vacation pay. Moreover, article 9 is entitled *Holiday Pay — Funeral Pay* and it makes little sense to think the Union and Company agreed to contribute to pensions on one and not the other. Moreover, the paucity of evidence and testimony on funeral leave allows the inference that it was not thoroughly discussed in the negotiations. This lack of give and take created a problem which is now resolved.

AWARD

Therefore, funeral pay is ruled to be covered by the phrase ''and/or paid'' in article 34 and pension contributions for funeral pay are to take effect upon receipt of this award.

Given this award, there is no reason for the Arbitrator to retain jurisdiction.